

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

AHMED HASAN WILLIAMS-EL,

Defendant-Appellant.

UNPUBLISHED

June 16, 2005

No. 253301

Cass Circuit Court

LC No. 02-010348-FC

Before: Hoekstra, P.J., and Jansen and Kelly, JJ.

PER CURIAM.

In connection with the shooting death of Damon Burroughs, defendant was convicted by a jury of first-degree felony murder, MCL 750.316(1)(b), possession of a firearm during the commission of a felony, MCL 750.227b, and possession of a firearm by a person convicted of a felony, MCL 750.224f. Defendant appeals as of right. We affirm.

Defendant first argues that an audio-taped statement by Renaldo Florence, who witnessed defendant shoot and kill Burroughs and testified to that fact at trial, was improperly admitted into evidence at trial because it constituted hearsay. However, by indicating that he had “[n]o objection” to the admission of the transcripts of this tape or the playing of the tape to the jury, counsel for defendant waived this issue for appellate review and in doing so extinguished any error arising from admission of the statement into evidence. See *People v Carter*, 462 Mich 206, 213-219; 612 NW2d 144 (2000). Accordingly, there is no error for this Court to review. *Id.* at 219. In any event, even if we were to review this issue we would find the challenged evidence to have been properly admissible under MRE 801(d)(1)(B), which excepts from the definition of hearsay certain prior consistent statements. Defense counsel implied during cross-examination that Florence’s trial testimony was influenced by a criminal charge stemming from his participation in the murder and pending against Florence at the time of trial. Because the statement at issue was made before the filing of that charge and, as conceded by defendant on appeal, was generally consistent with Florence’s testimony at trial, the statement was properly admissible to rebut the implication of improper influence or motive for testifying raised by defense counsel. MRE 801(d)(1)(B); see also *People v Fisher*, 220 Mich App 133, 154; 559 NW2d 318 (1996). Consequently, there was no error in the admission of the challenged evidence at trial.

Defendant also argues that an audiotape of a telephone conversation between defendant and another person made while defendant was incarcerated was improperly admitted because it

likely confused the jurors and was more prejudicial than probative under MRE 403. Generally, this Court reviews a trial court's decision to admit evidence for an abuse of discretion. *People v Adams*, 233 Mich App 652, 656; 592 NW2d 794 (1999). However, other than a bare citation to MRE 403, defendant cites no authority to support his terse and conclusory argument of evidentiary error. A party may not leave it to this Court to search for authority to sustain or reject its position. *In re Keifer*, 159 Mich App 288, 294; 406 NW2d 217 (1987). In any event, we find that the trial court correctly determined that the portion of the taped conversation admitted into evidence, wherein defendant appears to acknowledge his role in the murder, constituted an admission and was thus properly admissible by the prosecution under MRE 801(d)(2)(A). Moreover, although certainly prejudicial, this admission was not so prejudicial as to warrant its exclusion under MRE 403, which requires that the danger of unfair prejudice associated with marginally relevant evidence "substantially outweigh" its relevancy. Furthermore, any confusion of the jurors regarding the context of the admission was sufficiently allayed by defense counsel's explanation of the statement during closing argument. Accordingly, we find no basis on which to afford defendant any relief on this claimed evidentiary error.

Citing a number of grounds, defendant next argues that his trial counsel was ineffective. Because this Court denied defendant's motion to remand for a *Ginther*¹ hearing for failure to meet the requirements of MCR 7.211(C)(1), our review is limited to mistakes apparent on the record. See *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). A successful claim of ineffective assistance of counsel requires a defendant to show that counsel's performance was deficient and that there is a reasonable probability that, but for the deficiency, the results of the proceedings would have been different. *Id.* at 423-424.

With regard to his trial counsel's performance, defendant first argues that counsel was ineffective for failing to interview and call several witnesses who purportedly would have assisted his defense. Decisions regarding whether to call or question witnesses are matters of trial strategy that this Court "will not second-guess with the benefit of hindsight." *People v Dixon*, 263 Mich App 393, 311-312; 688 NW2d 308 (2004). Moreover, the "failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense," i.e., a defense that might have made a difference in the outcome of the trial. *Id.* at 312; see also *In re Ayres*, 239 Mich App 8, 22; 608 NW2d 132 (2000). Here, the record does not support that defense counsel's failure to interview or call any certain witness to testify at trial deprived defendant of such a defense. Although defendant has provided affidavits purporting to support his claim that counsel was ineffective for failing to call various witnesses, these affidavits fail to identify the substance of any testimony that might have been offered by these witnesses and, therefore, fail to show how the presence of these witnesses at trial "would have benefited defendant's case." *People v Davis*, 250 Mich App 357, 368-369; 649 NW2d 94 (2002). Consequently, defendant has failed to demonstrate that there is a reasonable probability that, but for counsel's failure to produce these witnesses, the results of the proceedings would have been different. *Snider, supra*.

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Defendant next argues that his trial counsel's cross-examination of prosecution witnesses Roberta Nickens and Lisa Stitt fell below an objective standard of reasonableness. His sole criticism of the cross-examination is that counsel failed to inquire of these witnesses whether they had received any "consideration or relief" in exchange for their testimony at trial. However, defendant has again failed to meet his burden of demonstrating that counsel's failure in this regard rendered his assistance ineffective. First, there is nothing in the record to support defendant's purported "belief" that these witnesses, both of whom were subjected to extensive cross-examination by defense counsel, received or even required consideration for their testimony. Moreover, the chief theory of defense in this case was that Florence and Raymond Washington, who were both present during the murder of Damon Burroughs, were themselves being charged with felony murder and that, therefore, their testimony was not credible because it promoted their interest in shifting blame for the killing to defendant. Defendant's closing argument reviewed and explored this theme. Given this theory of defense, and considering defense counsel's extensive cross-examination of both Nickens and Stitt, we do not conclude that counsel's failure to ask these witnesses about any possible consideration for their testimony affected the outcome of trial. Consequently, counsel's failure in that regard did not constitute ineffective assistance. *Id.*

Defendant next argues that counsel was ineffective for failing to object to the admission of the recorded statements of Florence. However, as previously noted, these statements were admissible under MRE 801(d)(1)(B). As such, counsel was not ineffective for failing to object to the admission of that evidence at trial. See *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003) (the failure to raise a futile objection does not constitute ineffective assistance of counsel).

Finally, defendant argues that the manager of the gas station where defendant first met the victim was unable to testify effectively because he lacked the aid of an interpreter at trial. Defendant claims that his counsel's failure to obtain an interpreter for the manager equates to a failure to even call the witness. However, our review of the manager's trial testimony does not reveal an ineffective witness who lacked a sufficient command of the English language to testify effectively. Because the record does not indicate that the witness required the assistance of an interpreter, defense counsel's failure to obtain an interpreter does not constitute ineffective assistance. *Snider, supra.*

Affirmed.

/s/ Joel P. Hoekstra
/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly